

**IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH, PRAYAGRAJ**

IA No.226/2022 IN CP (IB) No.223/ALD/2018

IN THE MATTER OF:

(An Application under section 60 (5) of the Insolvency And Bankruptcy Code, 2016 read with Rule 11 of NCLT Rules, 2016)

IN THE MATTER OF:

JVL Agro Private Limited

A Company registered under the Companies Act, 2013,
Having its registered office at Village, Tilmapur,
Ghazipur Road, Ashapur Varanasi, Uttar Pardesh-221007
... Under Liquidation

IN THE MATTER OF:

M/s BRS Refineries,

a Partnership Firm having its Registered Office at S.Y No.
190/1A, 1190/1E, 190/3, Annaram, Village, Farooqnagar
Mandal, Mahoobanagr, District Telangana-509228

... Applicant

Versus

MR. SUPRIYO KUMAR CHAUDHARI

LIQUIDATOR OR JVL AGRO INDUSTRIES LTD.
Having registered office at: BDO Restructuring Advisory LLP,
C/o BDO India LLP, 4th Floor, Duckback House, 41,
Shakespeare Sarani, Kolkata-700017

... Respondent

Order pronounced on 09.08.2023

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CORAM:

Sh. Praveen Gupta : Member (Judicial)

Sh. Ashish Verma : Member (Technical)

Appearances

Sh. Shubham Agarwal alongwith Sh. Shubham Agarwal, Adv.
: For the Applicant

Sh. Yash Tandon, Adv. : For the Respondent

ORDER

1. The present application has been filed on behalf of the M/s BRS Refiners (hereinafter Applicant) under section 60(5) of the Insolvency and Bankruptcy Code, 2016 r/w Rule 11 of the NCLT Rules, 2016. The Applicant is being aggrieved by the actions of the Respondent and is seeking direction to restrain the Respondent from forfeiting EMD amount of Rs. 96,00,000/- pursuant to E-Auction of Block A of assets of JVL Agro Industries Limited. Further, seeking directions to the Respondent to refund the EMD amount of Rs. 96,00,000/- along with compensation/damages caused to the applicant due to non- issuance of sale certificate.
2. The Applicant is a partnership firm who is engaged in the business of edibles oils and trading of such allied goods,



having registered office at S.Y No. 190/1A, 190/1E, 190/3, Annaram, Village Farooqnagar Mandal, Mahoobnagar, District Telangana-509228.

3. The brief facts of the matters leading upto the present application are as follows:-

- i. This Tribunal vide order dated 19.08.2020 ordered liquidation for the CD based on the report of the COC and appointed Mr. Supriyo Kumar Chaudhary as the Liquidator for carrying the liquidation process of the CD as per Liquidation Process Regulation, 2016.
- ii. The liquidator issued a public Notice dated 04.03.2022 for sale of Stand-Alone assets of the CD for E-Auction wherein it was mentioned that last date of EOI was 22.03.2022 and last date of submission of EMD was 04.04.2022, last date for inspection by interested party was 21.03.2022 and Date of Auction was fixed as 06.04.2022 from 11:00 am to 01:00 pm.
- iii. The Respondent vide an email dated 07.4.2022 announced the applicant as the successful bidder with highest bid of Rs. 12,60,00,000/- and Letter Of Intent



dated 06.04.2022 was issued to the Applicant along with bank details to provide the balance amount.

- iv. Applicant vide letters dated 08.4.2022 and 11.4.2022 sought information regarding loading of materials and confirmation of issuance of sale certificate for making the payment of remaining balance.
- v. Respondent vide an email dated 12.04.2022 informed the applicant about the order dated 04.04.2022 passed by this Hon'ble Tribunal in I.A No. 98/ALD/2022 wherein it was held as under :-

“The Liquidator directed to file reply affidavit in the matter within TEN days from today. Copies of the same be served on the counsel on record for the applicant.

List this matter on 26th April, 2022.

In the meantime, auction sale to proceed as planned. However, the same shall be subject to outcome of this IA. Further, the liquidator shall not proceed to issue sale certificate without prior approval of this Adjudicating Authority.”

- vi. Applicant vide letters dated 12.04.2022 and 13.04.2022 assured the respondent that balance will be credited in his account within the period of seven days of approval of Hon'ble NCLT for issuance of sales certificate.
- vii. Respondent vide an email dated 08.06.2022 demanded outstanding balance along with interest 12% p.a of Rs.



12,40,01,128.77/- within the period of 90 days from the date of LOI.

- viii. Applicant vide letter dated 22.06.2022 requested the Respondent to cancel the E-Auction and refund the EMD amount deposited by him along with damages. In furtherance of this Applicant vide letters dated 23.06.2022 and 28.06.2022 informed the Respondent that due to non-supply of oil within the time frame applicant has incurred a huge loss in delivering the oil to other suppliers on time. Moreover, the quality of oil has also depreciated which cannot be accepted.
- ix. In view of the aforesaid circumstances, the liquidator vide an email dated 28.06.2022 informed the applicant to deposit the outstanding balance of sale consideration on or before 05.07.2022 along with interest of Rs. 20,28,230/-
- x. It is stated that the Applicant being the trader of edible oils auctioned edible oil booked consignment for sale of auctioned edible oil of the Corporate Debtor with another supplier, namely M/s Sinotrach Oils. However, due to non-performance of the contract executed



between applicant and the respondent/liquidator, Applicant failed to deliver the said auctioned goods (edible oil) on time. As a consequence of non-supply of auctioned edible oil, M/s Sinotrach issued debit note of Rs. 1,20,00,000/- against the applicant for failure to deliver the goods on time.

xi. The Applicant alleges that during Mr. Chitrapal's visit to the Haldia plant to inspect the auctioned goods, the respondent/liquidator refused to grant permission for entry into the plant. The Respondent has even refused to conduct an inspection and collect samples of the oil.

xii. The Petitioner has prayed for the following relief:-

- i. *“Direction may be given to the Respondent/Liquidator to withdraw his email dated 28.06.2022.*
- ii. *Direction may be given to the Respondent/Liquidator to refund the EMD amount of Rs.96,00,000 along with interest.*
- iii. *Direction may be given to pay compensation towards the loss incurred by the Applicant.”*

4. In the meanwhile, this Tribunal vide order dated 01.06.2023 dismissed the I.A No. 98 of 2022 filed by the Employee Welfare Trust against the liquidator challenging the sale notice dated 24.01.2022 and composition of Stakeholders



Consultation Committee being arbitrary and not in accordance with law.

5. It is contended by the Liquidator in its Counter Affidavit that the entire liquidation process is carried out as per the provisions of Insolvency and Bankruptcy Code, 2016. The sale notice dated 04.03.2022 which contained the e-auction procedure was uploaded on the website of IBBI for e-auction scheduled on 06.4.2022. The clause (a) of the said sale notice categorically mentions that the e-auction scheduled on 06.4.2022 shall be subject to the orders of the Hon'ble NCLT, NCLAT, Hon'ble High Court and the Supreme Court of India. Copy of Sale Notice dated 04.03.2021 has been annexed as **R3 (Colly)** with the Counter Affidavit. This condition is enumerated in the sale notice on page 2 which is mentioned below:-

“The sale shall be subject to orders passed by the Hon'ble NCLT, Hon'ble NCLAT, Hon'ble High Courts, High Courts, Hon'ble Supreme Court of India and the provisions of the Insolvency and Bankruptcy Code of India, 2016 along with Regulations framed thereunder including



guidelines released by the IBBI. Interested parties should regularly visit the website of JVL Agro Industries Ltd. i.e. <https://www.jvlagro.com> or email at liquidatorjvl@lqjvl.com for access to E-Auction Process Information Document and other relevant information including updates required for participation in the E-Auction. All terms and conditions of the E-Auction Process information Document including addendums, corrigendum and clarifications provided thereto shall be deemed to have been incorporated in this Sale Notice.”

- 6.** Similar information was also mentioned in clause VII Page 2 of E-Auction Process Information Document stating that *“The entire process shall be subject to extant Regulations, the IBC and such orders as may be passed by the Adjudicating Authority (Hon’ble NCLT), Hon’ble NCLAT, and the Hon’ble Supreme Court of India.”* Copy of E-Auction Process Information Document has been annexed as **R-3 (Colly)** with the Counter Affidavit.



7. This Tribunal vide order dated 04.04.2022 in I.A No. 98/2022 and I.A No.89/2022 directed the liquidator not to proceed with issuance of sale certificate without prior approval of the adjudicating authority.
8. It is also contended by the liquidator that applicant was selected as the successful bidder, who offered the highest price for ***Block No. A-11 comprising of old expired stocks of more or less 1000 tons of packed Refined Edible Oil, not fit for human consumption, lying at JVL's plant at Debhog, Dist. Purba Medinipur, Haldia, West Bengal*** to be unpacked and sold by E-Auction. In pursuant of which LOI dated 06.04.2022 containing all the details of payment of remaining sale consideration was issued vide an email dated 07.4.2022 which was unconditionally accepted by the Applicant.
9. Further, the Liquidator/Respondent vide an email dated 12.04.2022 informed to the Applicant that oil will be dispatched upon receiving the orders from the Hon'ble NCLT and payment of balance sale consideration of the bid amount. Copy of the email has been annexed as **R5** with the Counter Affidavit.



- 10.** The Respondent vide an email dated 08.06.2022 requested the applicant to make the payment of balance sale consideration as 30 days from the date of issue of LOI already expired on 06.05.2022 and interest @ 12% shall be charged on the unpaid balance of sale consideration in terms of Regulation 33 clause 1(12) of Schedule I of the Insolvency Bankruptcy Board of India (Liquidation Regulation) Regulations, 2016. The total bid amount of Rs. 12,60,000 plus applicable GST of Rs. 63,00,000/-. Amount paid by the applicant is Rs. 96,00,000. Copy of email dated 08.06.2022 has been annexed as **R9** with the Counter Affidavit. The Respondent further vide emails dated 22.06.2022 and 28.06.2022 requested the applicant to pay the balance sale consideration before the expiry of 90 days i.e. 05.7.2022. Copy of aforesaid emails are annexed as **R10 (Colly)** with the Counter Affidavit.
- 11.** The Respondent has categorically denied the allegation of the applicant in para 9 of its counter affidavit regarding rejection of permission to inspect the materials kept at Haldia Plant. Respondent has stated that he allowed the applicant to



visually inspect the refined edible oil kept at Haldia site vide an email dated 22.06.2022.

- 12.** The Respondent has denied the Applicant's claim regarding the liquidator's failure to timely deliver the auctioned edible oil, which allegedly resulted in financial loss for the Applicant. The Respondent asserts that the liquidator cannot be held accountable for the market-driven price fluctuations of the oil, as they are governed by external market forces.
- 13.** In response to the counter affidavit filed by the Respondent, the applicant has filed Rejoinder on 07.12.2022 wherein the applicant has denied the averments made by the respondent/liquidator.
- 14.** We have considered the submissions made on behalf of the applicant as well as on behalf of the liquidator. In view of the aforesaid submission, made by both the parties and on perusal of materials on record, it is pertinent to mention here that a perusal of the Letter of Intent dated 06.4.2022 which has been attached as **Annexure R3 Colly** with the present counter Affidavit at its para 4 and 7 clearly states that the Balance of sale consideration shall be paid within the period



of 90 days and Letter of Intent and the E-Auction Process Information Document shall be subject to such orders as may be passed by this Tribunal or any competent court. More importantly, the said condition is also mentioned in the E-Auction Process Information Document at para 5.7 A(ii). Thus, the Applicant had clear knowledge of that said e-auction dated 06.4.2022 is subject to the orders passed by the Hon'ble NCLT, Hon'ble NCLAT or Supreme Court of India. Moreover, Applicant unconditionally accepted the Letter of Intent issued by the Respondent/Liquidator vide an email dated 07.04.2022.

- 15.** We may refer to the judgement of the Hon'ble NCLAT in the case of **Saboo Tor Private Limited Vs. Mr Sanjay Gupta; Company Appeal (AT) (Insolvency) No. 1098 of 2020 dated 18.01.2021**, wherein reliance is placed on the following two decisions of the Hon'ble Supreme court while upholding the confirmation of forfeiture of EMD by the Liquidator and held as under:-

“We find it a fit case to place reliance on the Judgement of the Hon'ble Supreme Court in National Highways Authority of India v. Ganga Enterprises, (2003) 7 SCC 410 in which the Hon'ble Apex Court has observed as follows: “The Indian Contract Act merely provides that a



person can withdraw his offer before its acceptance. But the withdrawal of an offer before it is accepted is a completely different aspect from forfeiture of earnest/security money which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into a contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/security in no way affects any statutory right under the Indian Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given an advantage or benefit of his own wrong by not allowing forfeiture. It must be remembered that, particularly in government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a term was not there even a person who does not have the capacity of a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted.”

16. Further, the Hon’ble Supreme Court in State of Haryana

V/s. Malik Traders, (2011) 13 SCC 200, has held as under:

“The right to withdraw an offer before its acceptance cannot nullify the agreement to suffer any penalty for the withdrawal of the offer against the terms of the agreement. A person may have a right to withdraw his offer, but if he has made his offer on a condition that the bid security amount can be forfeited in case he withdraws the offer during the period of bid validity, he has no right to claim that the bid security should not be forfeited and it should be returned to him. Forfeiture of such bid security amount does not, in any way, affect any statutory right under Section 5 of the



[Contract] Act. The bid security was given by the respondent and taken by the appellants to ensure that the offer is not withdrawn during the bid validity period of 90 days and a contract comes into existence. Such conditions are included to ensure that only genuine parties make the bids. In the absence of such conditions, persons who do not have the capacity or have no intention of entering into the contract will make bids. The very purpose of such a condition in the offer/bid will be defeated if forfeiture is not permitted when the offer is withdrawn in violation of the agreement.”

- 17.** With regard to issue of compensation as claimed by the Applicant in his prayer it is stated that in **Westcoast Infraprojects Pvt. Ltd. Vs. Mr. Ram Chandra Dallaram Choudhary, Liquidator of Anil Ltd. the Hon’ble NCLAT**, New Delhi has been held that “*Section 74 of Indian Contract Act, 1872 has no application in the case of Auction conducted by the Liquidator under the IBC Liquidation Process Regulations, 2016 and when the clauses of Tender document clearly empowers Liquidator to forfeit the EMD/any payment on default by the H1 Bidder, no exception can be taken to the action of the Liquidator in cancelling the sale and forfeiting the amount deposited by H1 Bidder.*”
- 18.** Therefore, in view of the aforesaid judgements we are of the considered opinion that the applicant is not entitled to claim compensation for breach of contract committed by him. The



prayer made in the present application for directions to be issued to the liquidator to refund the EMD amount of Rs.96,00,000/- and award compensation for the loss incurred by him is thus not sustainable. Therefore, we are not inclined to accept the prayer made in the application.

- 19.** The liquidator is directed to take immediate steps forthwith for auctioning the assets of the Corporate Debtor under reference afresh in accordance with law and file the status report within a period of 04 weeks from the date of this order.
- 20.** I.A bearing no. 226/2022 is thus, dismissed accordingly.

-Sd-

(ASHISH VERMA)
Member (Technical)

-Sd-

(PRAVEEN GUPTA)
Member (Judicial)